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No. 87-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions representing approximately 13,000,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

ARGUMENT

Introduction and Summary

In the brief *amici curiae* the AFL-CIO, *et al.*, submitted in *Treasury Employees v. von Raab*, No. 86-1879 —the case scheduled to be heard in tandem with the instant case—we began by observing that *von Raab* "provides a distorting prism through which to consider" the

questions posed by the run of cases challenging drug testing requirements. AFL-CIO Br. in No. 86-1879 at 3. That observation applies with even greater force in the instant case.

At issue here are regulations promulgated by the Federal Railroad Administration ("FRA") requiring railroads to conduct drug testing following certain types of train accidents and "authorizing" railroads to test under other defined circumstances (such as following certain rule violations). As in *von Raab*, the testing program here applies to all employees falling within a narrowly defined cohort. And, as in *von Raab*, the Solicitor General is able to proffer carefully-tailored and quite limited justifications for the program.

In the final analysis, however, the Government's defense of these programs rests on the proposition that while subjecting individuals to blood and urine tests for drugs may cause "some inconvenience," Pet. Br. at 35, such "modest toxicological test[s]," *id.* at 30 n.30, "entail a minimal intrusion on employees' expectation of privacy," *id.* at 25. That proposition, if sustained, could be used to justify virtually *any* drug testing program no matter how far-ranging, and not just the more limited programs before the Court. It is thus essential, in our view, at the very outset for the Court to be informed about what is going on in the word of drug testing.

As public concern over drug use in the society has risen, broadscale, random testing has become very much the order of the day. These random drug testing programs lie at the "heart and soul" of the wave of constitutional litigation in the lower courts. *Policemen's Benevolent Assn. v. Township*, 672 F. Supp. 779, 785 (D.N.J. 1987), *rev'd*, —— F.2d ——, 3 BNA Ind. Empl. Rights. 699 (3d Cir., June 21, 1988).[1]

[1] In just the past four months, since our brief in *von Raab* was filed, seven new decisions have been reported concerning the constitutionality of random drug testing. The plan of several agencies of the Federal Government to commence random drug testing, which we discuss in text *infra* at pp. 3-5, has been enjoined by three district courts. *Harmon v. Meese*, No. 88-1766 (D.D.C., July 29, 1988) (Justice Department); *Government Employees Council 33 v. Meese*, No. C-88-1419 SAW (N.D. Cal. June 16, 1988) (Bureau of Prisons); *Quadros v. Reagan*, No. C-88-1764-RHS (N.D. Cal., August 22, 1988).

In addition, one appellate court and two district courts have invalidated random drug testing programs initiated by local governments. *See Lovorn v. Chattanooga*, 846 F.2d 1539 (6th Cir. May 23, 1988); *Guiney v. Rouche*, —— F. Supp. ——, 3 BNA Ind. Empl. Rights, 598 (D.Mass., May 23, 1988) (Keeton, J.); *Detroit Police Officers Assn. v. Detroit*, No. 88-7118 (E.D. Mich., June 14, 1988). Two courts of appeals have reached contrary conclusions. *Ruston v. Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988); *Local 8, Policemen Benevolent Ass'n v. Township*, —— F.2d ——, 3 BNA Ind. Empl. Rights 699 (3rd Cir., June 21, 1988).

The nature of the more-contemporary, random testing programs is perhaps best illustrated by the recently-announced program for the testing of federal employees.[2] Acting pursuant to Executive Order No. 12564, 51 Fed. Reg. 32889 (1987), which authorizes testing only of employees occupying "sensitive" positions, the cabinet agencies and large non-cabinet agencies—the "Tier I" agencies for purposes of the drug testing program—have decided to subject to random testing 345,528 federal employees, roughly 17% of the workforce employed by these

[2] Indicative of the change in the times is the fact that just three years after the FRA promulgated the regulations at issue in this case, and even though, by its own admission, the drug testing that has been done under those regulations has revealed a level of drug use "below many previous estimates . . . notwithstanding the fact that drug users would be expected to be overrepresented in the population sampled (employees involved in accidents)," 53 Fed. Reg. 16641 (May 10, 1988), the FRA has recently proposed a new regulation which would mandate random drug testing of *every* railroad employee who is covered by the Hours of Service Act, 45 U.S.C. §§ 61 et seq. *See* 53 Fed. Reg. 16651-52 (May 10, 1988). Significantly, the FRA rejected such a requirement just three years ago. *See* 50 Fed. Reg. 31550 (1985) ("it does not appear to be fair to subject the majority of sober employees to testing in the absence of some reason to question their fitness").

agencies.[3] The positions designated for such testing include, *e.g.*, financial analysts, financial assistants, statisticians and secretaries in the Economic Litigation Section of the Antitrust Division of the Justice Department;[4] attorneys in the Appellate Section of the Civil Rights Division;[5] recreation assistants and public affairs officers employed by the Interior Department;[6] and pipefitters, cooks, and messmen employed by the Department of Commerce.[7]

As the scope of these random drug testing programs has expanded, the rationale that is being offered has shifted as well. Increasingly, such programs are defended not so much on employment-related grounds as on *law enforcement* grounds, *viz.*, on the ground that the workplace provides a convenient situs for detecting illegal drug use, and that employment-sanctions provided a useful means of deterring such drug use. Thus, for example, President Reagan has stated that employment-based drug testing is "an essential part of the effort" to "transform[] illegal drug users into nonusers."[8] Former Attorney General Meese likewise advocated expansive drug testing programs in part because such program would "prevent people from disobeying the law."[9] And Assistant Attorney General Bolton, in urging the United States District Court for the District of Columbia to dismiss a constitutional challenge to the Justice Department's plan to test randomly a sizable number of its own employees,

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[3] *Daily Labor Report*, May 5, 1988, p. A-8.

[4] *See Harmon v. Meese*, No. 88-1766 (D.D.C. July 29, 1988).

[5] *Id.*

[6] *Washington Post*, July 7, 1988, p. A3.

[7] *Washington Post*, May 5, 1988, p. A22.

[8] 24 President Documents 774 (remarks to the National Conference on a Drug Free Workplace, June 9, 1988).

[9] *Washington Post*, April 27, 1988, p. 1.

argued that "We believe the whole world is watching . . . including . . . Manuel Noriega."[10]

The breadth of these random testing programs and the fact that the government interest underlying those programs is quite different from the interest asserted here arguably provides a ground for distinguishing random testing from the post-accident testing required by the FRA regulations. But the threshold question raised by random testing and raised here—*viz.*, whether the testing entails only "a minimal intrusion" on employee privacy—is the same. And while, under the developed Fourth Amendment law, the Government's burden in justifying a drug testing program varies depending on the degree of the intrusion, the converse is not true: whether an intrusion is significant does not depend upon the number of employees being tested or the strength or weakness of the justification for the testing.

Thus, if the Court were to accept the Solicitor General's position on this threshold issue that would go far toward validating wide-ranging random drug testing program as constitutionally reasonable. We therefore proceed in developing our argument on the premise that this case must be approached as if the lawfulness of random testing of the type instituted by the Federal Government were hanging in the balance.

With this in mind, we turn to the specifics of the FRA regulations at issue here. In Part I we address the portion of the regulation that mandates post-accident testing; we show that because drug testing necessarily threatens *significant* privacy expectations, the FRA regulations are violative of the Fourth Amendment insofar as the regulations require testing without any reason to believe, in a particular case, that the testing will yield evidence of wrongdoing.

In Part II, we address the portion of the FRA regulation that authorizes, but does not compel, testing under

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[10] *Washington Post*, July 29, 1988, p. A17.

other circumstances. As we demonstrate, it is neither necessary nor appropriate for the Court to decide the distinct constitutional questions posed by governmental authorization of drug testing by private employers, because the authorization here is so clearly contrary to the Railway Labor Act as to be beyond the FRA's regulatory authority.

I. Subpart C Of The FRA Regulations Mandates Searches Which Are Constitutionally Unreasonable.

Subpart C of the FRA regulation provides in pertinent part that following an accident of the type described in the regulation, the railroad "shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident"—including "each and every operating employee assigned as a crew member" and any "dispatcher, signal maintainer, or other covered employee . . . directly and contemporaneously involved in the circumstances of the accident"—provide blood and urine samples for toxicological testing by FRA." 45 C.F.R. § 219.203(a)(1), (2). Once secured, the blood and urine must be "made available" to FRA by mailing the samples to a laboratory designated by the FRA; the laboratory then notifies the FRA and the FRA in turn "notifies the railroad and the tested employee of the result of the toxicological analysis." *Id.* §§ 219,204(c), 250(a), 206(d), 211(a).

There is no doubt, and the Solicitor General concedes, that the "post-accident testing under Subpart C . . . must be regarded as a search within the meaning of the Fourth Amendment." Pet. Br. at 24 n.26. It is equally clear, as the Solicitor General at least implicitly acknowledges, that these searches are conducted absent any "individualized suspicion" of wrongdoing by the employees being searched, Pet. Br. at 22: given the multiple causes of accidents, the fact that an accident has occurred does not provide reason to believe that any employee—let alone *every* crewmember and every other employee somehow involved in the "circumstances of the accident" whether

or not the employee can be said to have played any role in causing the accident—was under the influence of alcohol or drugs at the time. Thus, to defend Subpart C the FRA must bear the heavy burden of justifying these searches as falling within the very limited constitutional permission for searches *without* individualized suspicion. As we proceed to show, the FRA has failed to sustain that burden.

A. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The central challenge posed by the Amendment is to define "reasonable" and "unreasonable" searches.

From the first it has been clear that the Amendment proscribes more than merely *gratuitous* invasions of privacy; *viz.*, invasions unsupported by any reason. The guiding principle of the Founders is that the Government's power to initiate a search must be limited even where the Government is acting to further a legitimate end in a sensible and efficient way. Thus, for example, while a rational law enforcement officer, dedicated to maximizing the deterrent power of the law and the efficacy of police investigations, would no doubt deem it entirely reasonable to conduct spot searches or searches based on trained intuition in order to uncover evidence of wrongdoing, the Fourth Amendment has always been understood to embody a higher value than promoting the most efficient or most effective law enforcement techniques. As the Court has stated:

> The needs of law enforcement stand in constant tension with the Constitution's protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. [*Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973)].

To protect the values of the Fourth Amendment, the Court has held that "individualized suspicion is usually a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-62 (1976). In most cases, that suspicion must reach the level of "probable cause" before a search (or seizure) is permitted; in our society we have decided that at "that point it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security." *Winston v. Lee*, 470 U.S. 753, 758 (1985).

The probable cause requirement is not an absolute, of course; "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable' " the Court has "permitted exceptions" to that requirement and authorized searches on a "lesser quantum of evidence," *viz.*, on "reasonable" (rather than probable) cause, *Griffin v. Wisconsin*, —— U.S. ——, 55 L.W. 5156, 5157-58 & n.4 (June 23, 1987) (emphasis added). *See also O'Connor v. Ortega*, —— U.S. ——, 55 L.W. 4406 (March 31, 1987); *New Jersey v. T.L.O.* 469 U.S. 325 (1985). And the Court has even held that individualized suspicion is not an "irreducible requirement" of the Fourth Amendment. *United States v. Martinez-Fuerte, supra*, 428 U.S. at 561.

But for present purposes the essence of the matter is this: "[e]xceptions to the requirement of individualized suspicion are generally appropriate *only where the privacy expectation implicated by a search are minimal.*" *New Jersey v. T.L.O., supra*, 469 U.S. at 342 n.8. Accordingly, as the Solicitor General at least implicitly concedes, to sustain Subpart C the Government must establish that "[t]he FRA regulations entail a minimal intrusion on employees' expectation of privacy." Pet. Br. at 25. As we proceed to show, the intrusion on privacy here is anything but minimal.

1. Subpart C requires that both a blood and a urine sample be collected from each covered employee following each covered accident/incident. Blood testing, of course, necessitates an "intrusion[] into the human body." *Schmerber v. California*, 384 U.S. 757, 767 (1966). And urine testing, at least as mandated by the FRA, requires that an individual expose herself; urinate on command while a government agent watches; and then turn over the urine to the government for a chemical analysis.[11]

There can be no doubt that such forced blood and urine collection implicates vital Fourth Amendment interests, "the individual's dignitary interests in personal privacy and bodily integrity," *Winston v. Lee, supra*, 470 U.S. at 761. *See* AFL-CIO Br. in No. 86-1879 at 8-13.[12] That the collection occurs, under the FRA regulation, immediately after a traumatic event, *viz.*, an accident, at a time when the employee is likely to feel especially vulnerable, and takes place under an aura of suspicion, with the test results going directly to the Federal Government in Washington, makes the "psychological intrusion," *Delaware v. Prouse*, 440 U.S. 648, 657 (1979), all the more severe, and the Fourth Amendment concern that much greater.

2. The Solicitor General nonetheless attempts to minimize the Fourth Amendment interests that are involved here by seeking to trivialize both the nature of the procedures that are required under Subpart C and the privacy expectations of the employees who are subject to

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[11] The FRA's *Alcohol and Drug Field Manual*, Unit D, ¶¶ 4.5.2, 4.5.3 at p. D-5 requires that the employee urinate "[u]nder direct observation" by the technician of the medical facility at which the urine is being collected.

[12] *See also* Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968):

> [I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem.

those procedures. The Solicitor General's argument fails at all points.

(a) The fundamental error in the Government's submission is its failure to come to grips with the fact that the Fourth Amendment interest that is implicated here is the interest in "*bodily integrity.*" This Court has never held an invasion of that interest—an invasion of the body—to be a "minimal intrusion on . . . expectation[s] of privacy." *Cf.* Pet. Br. at 25. To the contrary, the Court has ruled that even the process of removing "scrapings" from under the fingernail "constitute[s] the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). And whereas all searches of property are permissible where sufficient justification is shown, the Court has held that some invasions of the body are *per se* unconstitutional regardless of the strength of the government's justification. *See Winston v. Lee, supra.* In short, there is no higher Fourth Amendment value than the protection of the individual's bodily integrity.[13]

Contrary to the Solicitor General's suggestion, the fact that it "has become routine in our everyday life" for individuals to voluntarily submit to the "blood test procedure" or for men to voluntarily urinate in view of other men, Pet. Br. at 35-36, is of no relevance in assessing whether the privacy expectations at stake here are minimal or substantial. By a parity of reasoning, general searches of the home could equally be characterized as minimally intrusive inconveniences since it is equally commonplace for homeowners to invite guests to visit in (and household employees to work in) the home.

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[13] *Cf. Schmerber v. California, supra*, 384 U.S. at 767-68 ("Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate").

As this hypothetical illustrates, the determinative issue regarding the existence *vel non* of a reasonable expectation of privacy is *whether the individual claiming such an expectation has retained control over access*; the frequency with which the individual has on a selective case-by-case-basis voluntarily opened up that which she otherwise has elected to keep private says nothing about whether a *forced* government entry is proper. Not surprisingly the cases in which this Court has found privacy expectations to be minimal or nonexistent have involved, in the main, situations in which the individual claiming the privacy expectation could not reasonably expect to determine whether an intrusion would occur.[14]

Similarly, and again contrary to the Solicitor General's suggestion, the fact that under Subpart C the blood and urine samples are taken from employees who work in the railroad industry is quite beside the point. The "operational realities of the workplace" may lead employees to have a diminished expectation of privacy "in their *place of work*"—*viz.*, "in their offices, desks and file cabinets"—at least with respect to "an intrusion [which] is by a supervisor," but it is equally true that . . . [n]ot everything that passes through the confines of the business address can be considered part of the workplace context." *O'Connor v. Ortega, supra*, 55 L.W. at 4407-08 (emphasis added).

In particular, in our society employees do *not* surrender their expectation of privacy with respect to their

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[14] *California v. Greenwood*, —— U.S. ——, 56 L.W. 4409 (May 16, 1988) (bags of garbage placed outside for collection); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (aerial photographs of outdoor areas); *California v. Ciraolo*, 476 U.S. 207 (1986) (same); *New York v. Class*, 475 U.S. 106 (1986) (vehicle identification number required to be in plain view); *Maryland v. Macon*, 472 U.S. 463 (1985) (books in bookstore); *Smith v. Maryland*, 442 U.S. 735 (1979) (phone numbers called from one's telephone); *United States v. Miller*, 425 U.S. 435 (1976) (checks, deposit slips and the like held by a bank).

bodily integrity each time they report to work any more than employees surrender their expectation of privacy with respect to their "handbag or briefcase each workday." *Id.* at 4407. *See* AFL-CIO Br. in No. 86-1879 at 13-14. And while, as the Solicitor General observes, the railroad industry is "subject to extensive public and private regulation," Pet. Br. at 26, nothing in that regulatory scheme —"the 'bulk' of [which] . . . relate[s] to the fixed facilities and equipment, not to personnel," *id.* at 30 n.30— suggests that railroad employees' have diminished expectations of privacy with respect to the integrity of their bodies.

The closest the FRA comes to identifying some preexisting practice or regulation even remotely bearing on railroad employees' privacy expectations is its assertion that "the railroads have historically imposed exacting physical requirements for employment in particular posts, including periodic physical exams that typically involve taking blood and urine samples." Pet. Br. at 29. But as we showed in our brief in *von Raab*, physical examinations are conducted in a medical environment for medical reasons by medical personnel who are subject to the constraints of the medical profession with respect to disclosing the test results, and thus the existence of such programs does not diminish the exployees' reasonable expectations of privacy with respect to the type of government-mandated drug testing at issue here. AFL-CIO Br. in No. 86-1879 at 24-26.[15]

[15] In *von Raab*, the Solicitor General has argued that "the government, in its capacity as an employer, may impose reasonable employment-related restrictions on the rights of employees that would be plainly unconstitutional if imposed on citizens at large." Br. for Resp. in No. 86-1879 at 20, *citing, e.g., Connick v. Meyers*, 461 U.S. 138, 147 (1983) ("a federal court is not the appropriate forum to review the wisdom of a personnel decision taken by a public agency").

It is important to note that, whatever its merits, that argument has no force here since in this case the Government is *not* acting as employer; rather, the Government is acting in its traditional role of regulator of private employers.

(b) For all these reasons, this case is poles apart from *New York v. Burger*, —— U.S. ——, 55 L.W. 4890 (June 19, 1987), the Court's most-recent administrative search case, on which the Solicitor General relies. Pet. Br. at 26, 30. In that case the Court sustained an inspection, without individualized suspicion, of the inventory of an automobile junkyard. But that inspection implicated only a minimal privacy interest for two reasons.

First, as the Court explained, the search in *Burger* "was of a commercial premises," and "[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home." 55 L.W. at 4893. Second, junkyard dealers are so "closely" and "pervasively" regulated, *id.*, that the junkyard dealer " 'cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes," *id.* at 4894 n.16, *quoting Donovan v. Dewey*, 452 U.S. 594, 600 (1981). The *Burger* Court thus analogized the junkyard business to the business of selling firearms, 55 L.W. at 4892, and quoted *United States v. Biswell*, 406 U.S. 311, 316 (1972), in which the Court had found that "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."

This case, in contrast, involves searches of the *person*, and *not* of "*commercial property*." And *nothing* in the regulations or practices on which the Solicitor General relies suggests that employees who work on railroads "cannot help but be aware" that they will be subject to forced periodic searches by the Government which *compromise their bodily integrity*. Thus, the testing required by Subpart C does invade a significant expectation of

privacy. Because that is so, *New Jersey v. T.L.O.* requires some measure of individualized suspicion to justify the intrusions. P. 8 *supra*. As Subpart C mandates searches absent such suspicion, the regulation is constitutionally infirm.[16]

B. In light of the foregoing, the Solicitor General's discussion, Pet. Br. at 36-39, of the "governmental interests" served by Subpart C is ultimately beside the point; indeed, we do not understand the Solicitor General to claim that these interests can support the regulation if, as we have shown to be the case, significant privacy interests are in fact implicated. Nonetheless, our discussion

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[16] In *New Jersey v. T.L.O.*, the Court stated a second and independent requirement for dispensing with individualized suspicion: " 'other safeguards' [must be] available 'to assure that the individual's reasonable expectation of privacy is "not subject to the discretion of the official in the field." ' " 469 U.S. at 342 n.8.

In the instant case, Subpart C, while placing on the railroads mandatory obligations to conduct testing, leaves it to the "railroad representative responding to the scene of the accident/incident [to] determine whether the accident/incident falls within the requirements of . . . this section." 45 C.F.R. § 219.201(c). The "railroad representative" thus must make a series of quasi-factual determinations as to whether, *e.g.*, the accident caused "[d]amage to railroad property of $50,000 or more"; which employees were "directly and contemporaneously involved in the circumstances of the accident/incident" and which employees "had no role in the causes(s) of the accident/incident"; and whether the "safety and convenience of passengers" requires that the crew continue operating the train rather than report for testing. *See* 45 C.F.R. §§ 219.201(a)(ii), .203(a)(2), (a)(3)(i), (b)(3). As a result, to a considerable degree Subpart C leaves railroad employees subject to the "discretion of the official in the field" as to whether they will or will not be tested.

The question of whether field officials are adequately controlled when so much fact-finding discretion remains is an open one in this Court, and a question of considerable difficulty. We do not pursue that question here because, in any event, as we have showed in text, the searches mandated by Subpart C infringe a substantial expectation of privacy.

would be incomplete if we did not at least briefly review the two justifications advanced for the FRA regulations.

1. The Solicitor General first argues that the post-acident testing mandated by Subpart C will "help to deter employees from using alcohol and drugs on the job." Pet. Br. at 38, *quoting*, 50 Fed. Reg. 31541 (1985). That rationale could be used to justify any drug testing program and indeed any type of search. Permitting searches without individualized suspicion can almost always be said to deter the wrongdoing the search is designed to ferret out; the common sense of the matter is that some wrongdoers will be sufficiently confident of their own ability to avoid raising suspicion that they will fear only random—as distinguished from cause-based—police investigations. If this rationale were sufficient to justify a search, the Fourth Amendment would be drained of its vitality. Not surprisingly, therefore, the Court has squarely rejected this rationale when advanced to justify other searches not supported by individualized suspicion. *E.g., Almeida-Sanchez v. United States, supra,* 413 U.S. at 273 ("It is not enough to argue . . . that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one").[17]

2. The FRA alternatively argues that its program of post-accident testing will "permit the agency 'to deter-

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[17] Ironically, the instant case may be one of the few in which there is reason to doubt the Government's claim that permitting searches without individualized suspicion will have a deterrent effect on those subject to the searches.

The claim for deterrence here rests on the premise that employees who are so fearless or foolish as to be unaffected by the prospect that their use of drugs or alcohol may *cause* an accident in which the employees themselves *will be at risk*—and who are thus willing to put their own life and the lives of others on the line—nonetheless will be deterred by the prospect that if an accident meeting certain criteria occurs, the employees' blood and urine will be tested. That is, at the least, a questionable premise.

mine with greater precision the causes of major accidents of interest to the public' and thereby to take further measures to safeguard the general public." Pet. Br. at 38-39, *quoting*, 50 Fed. Reg. 31541 (1985). This argument, unlike the first, is carefully tailored to support only post-accident drug testing rather than all forms of drug testing. Nonetheless, the argument does not withstand close scrutiny.

We do not doubt that the Government has a significant interest in ascertaining the cause of train accidents; indeed that interest is much like the governmental interest in ascertaining the causes of fires. *See Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978). And in *Clifford* and *Tyler* the Court went so far as to sustain warrantless, investigative searches conducted by fire officials without individualized suspicion of wrongdoing. But as might be deduced from the Solicitor General's failure even to cite those cases, the searches mandated by Subpart C of the FRA regulations go further than even *Clifford* and *Tyler* allow.

Clifford and *Tyler* permit fire investigators to conduct administrative searches of premises damaged by "a fire of undetermined origin." *Clifford*, 464 U.S. at 294. The permitted search must "not intrude unnecessarily on the fire victim's privacy" and must "be executed at a reasonable and convenient time." *Id.* Moreover, the scope of the search must be "limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling." *Id.* at 297. And very much to the point here, if "the primary object of the search is to gather evidence of criminal activity," *id.* at 294, or if, in the course of the search, "the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution," *Tyler*, 436 U.S. at 512, a "showing of probable cause" is required. *Clifford*, 464 U.S. at 294; *Tyler*, 436 U.S. at 512.

In at least two respects, the searches mandated by Subpart C of the FRA regulation go beyond the carefully confined permission for administrative searches recognized in *Clifford* and *Tyler*.

First, the regulation requires testing for *all* employees and *all* accidents, without regard to whether the particular test is necessary or even useful in ascertaining the accident's cause. The regulation thus leaves virtually no room for judgments to be made as to which employees are most implicated or least implicated in the accident; the only time drug testing is excused is if the "railroad representative" who "responds to the scene" can "immediately determine on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident," and even that narrow exception is inapplicable with respect to "major train accidents," *viz.*, those involving a fatality, release of a hazardous material, or over $500,000 in property damage, 45 C.F.R. § 219.204(a)(3). And the regulation does not require, or even permit, the railroad to limit the testing to employees suspected of being under the influence of a drug even though the record demonstrates that railroad representatives responding to accidents can be trained to make such assessments in a reliable way on the basis of nonintrusive examinations.

Second, Subpart C mandates two discrete intrusions on privacy, the collection of blood and the collection of urine, each of which raises independent Fourth Amendment concerns. Yet blood testing *alone* is sufficient—and, indeed, is necessary—to determine whether the individual tested is under the influence of a drug at the time of the test. Because the drug works its influence only while is in the blood stream, the only individuals who will test positively

on a urine test but not on a blood test are individuals who used a drug long enough in the past to no longer feel its effects but who still have a metabolite (or by-product) in their urine. Urine testing, in other words, adds *nothing* to an investigation genuinely concerned with identifying the cause of an accident and therefore expands the scope of the search in a wholly unwarranted fashion.[18]

Because Subpart C mandates testing in every case and mandates both blood and urine testing, the regulation mandates searches which are not "reasonably necessary to determine the cause" of a train accident and which "intrude unnecessarily" on the privacy of railroad employees. *Clifford*, 464 U.S. at 294, 297. Indeed the Subpart C urine tests are explicable only on the theory that the true purpose of the test is not administrative/investigative but rather "to gather evidence of criminal activity." *Id.* at 294. In all events, at least this much is clear: the searches required by Subpart C cannot be squeezed within the holding and rationale of this Court's fire-inspection cases. And there is no other basis on which the blood and urine testing mandated by the regulation can stand. The regulation should therefore be held to be violative of the Fourth Amendment.

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[18] Significantly, Subpart D of the FRA regulations, which authorizes (but does not require) drug testing in circumstances not covered by Subpart C, requires only urine testing but gives the employee the option of providing a blood sample, *see* 45 C.F.R. §§ 219.305(d), .309; under the regulation the employee must be informed of this option at the time the sample is collected, must be told that the "blood test will provide information pertinent to current impairment," and must be advised as follows:

> Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to *sixty* days before the sample is collected). As a general matter, the test cannot distinguish between recent use off the job and current impairment. [*Id.* § 219.309(b)(2).]

II. Subpart D Of The FRA's Regulations Exceeds The FRA's Authority Under The Federal Railroad Safety Act.

Subpart D of the FRA's regulations, unlike Subpart C, *does not require* any drug testing but merely provides "authorization" to the railroads under defined circumstances, such as on the employee's violation of one of various operating rules, to conduct such testing as the railroads deem appropriate. The parties have urged this Court to decide the constitutionality of this "authorization," and in so doing to resolve the novel question of whether searches conduct by a private party pursuant to governmental authorization must satisfy the dictates of the Fourth Amendment. *See* Pet. Br. at 24-25 n.26; Pet. App. 10a-13a.

In our view, however, it is not necessary, and therefore not appropriate, to resolve this constitutional issue. *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, S., concurring.) For, as we proceed to show, Subpart D is so clearly contrary to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), as to fall outside the FRA's regulatory authority under the Federal Railroad Safety Act, 45 U.S.C. §§ 421 *et seq.* ("FRSA").[19]

A. It is important to be clear at the outset as to precisely what is intended by the "authorization" of drug testing contained in Subpart D. The Solicitor General coyly notes that Subpart D was promulgated "in part to

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[19] The court of appeals in this case considered and rejected a variety of statutory arguments, including several based upon the RLA. *See* Pet. App. at 32a-34a. It is not entirely clear to us whether the argument developed in text was subsumed within any of the statutory contentions pressed before the lower courts.

Nonetheless because this is a pure question of law, because the FRA will have a full opportunity to respond to our submission in its reply brief, and because a ruling on this ground would avoid a needless constitutional decision, we believe the Court is free to reach the statutory issue even if the issue had not been squarely presented below.

preempt state and local rules that might otherwise have prohibited breath and urine testing by private employers." Pet. Br. at 25 n.26.[20] But as the preamble to the regulation makes clear, the far larger purpose of Subpart D is to relieve railroads of their obligations under the RLA to meet and confer with the representatives of their employees before instituting a drug testing program and to relieve railroads of the obligation to comply with their lawful collective bargaining agreements regulating drug testing. Thus, the FRA explained the need for the regulation in the following terms:

> Although the railroads clearly desire to prevent alcohol and drug-related accidents, and have obvious incentives to do so, *the policy of the Railway Labor Act, as construed in arbitration and in the courts, severely limits the ability of management to implement new techniques to control the problem. . . . [P]rograms of testing would . . . be deemed to offend the status quo policy of the Railway Labor Act, if implemented by unilateral action of management.*

[20] It is far from clear that Subpart D can have such preemptive effect. Section 205 of the FRSA, 45 U.S.C. § 205, provides in pertinent part that:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be *nationally uniform* to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement.

As the statutory language indicates, in enacting this section Congress intended that "[o]nce the Secretary has prescribed a *uniform national standard*, the State would no longer have authority to establish Statewide standards." H.R. Rep. 91-1194, 91st Cong. 2d Sess. at 19 (1970) (emphasis added). Subpart D, however, does not in any meaningful sense establish national uniformity; under that Subpart it is left to each railroad to decide whether and to what extent to administer drug tests following rule violations. Whether this is the type of federal standard that can displace state law is thus open to the most serious question.

> In theory, of course, the railroads could bargain with employees to obtain the right to test. But history suggests that there is no real likelihood that such an agreement could be reached . . . [50 Fed. Reg. 31528 (1985); emphasis added.]

And the FRA explained the effect that Subpart D would have as follows:

> [T]*he regulation supersedes any provision of a collective bargaining agreement, or arbitration award construing such an agreement*, and preempts any State law limiting the ability of an employer to require testing.
>
> This does not mean that a railroad may not enter into collective bargaining agreements relating to conditions under which tests may be conducted. The railroad may do so and is free to observe, as a matter of practice, any constraints contemplated by the agreement, so long as the railroad is not inhibited from effective enforcement of these regulations. *However, the railroad may not divest itself of the authority conferred by this section* . . . The authority conferred here is conferred for the purpose of promoting the public safety, *and a railroad may not shackle itself in a way inconsistent with its duty to promote the public safety.* [*Id.* at 31552; emphasis added]

B. It is difficult to imagine a more frontal assault on the RLA and its policies. The RLA rests on the premise that "stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." *Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330, 336 (1960). To achieve such terms the Act "safeguards an opportunity for employees to obtain contracts through collective rather than individualistic bargaining." *Id.* Indeed, the duty to bargain stated in RLA § 2, First, 45 U.S.C. § 152, First, lies at

"the heart of the Railway Labor Act," *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 377 (1969).[21]

"[A]bsent a collective bargaining agreement," management "hires and fires, pays and promotes, supervises and plans . . . freely except as limited by public law and by the willingness of the employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). The very point of the collective bargaining system which the RLA (and the National Labor Relations Act) seek to foster is thus to enable employees to secure legally-enforceable rights which will "regulate or restrict the exercise" of management's otherwise unfettered prerogatives. *Id.*

In promulgating Subpart D, the FRA has, in essence, decided that the judgments Congress made in enacting the RLA were wrong (at least with regard to drug testing); collective bargaining is not, in the FRA's view, an effective or desirable means of promoting rail safety. Rather, according to the FRA, rail safety is best served by assuring *employers unfettered discretion* to decide whether

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[21] Equally "central to [the] design" of the RLA is the Act's "status quo requirement," *viz.*, the obligation "to refrain from altering the status quo by resorting to self-help while the Act's remedies [a]re being exhausted." *Shore Line v. Transportation Union*, 396 U.S. 142, 150, 148 (1969). The "immediate effect" of that requirement

> is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce. [*Id.* at 150]

and to what extent to administer drug tests. Thus, the point of Subpart D is not only to allow employers to act unilaterally with respect to drug testing—itself a cardinal violation of the RLA—but to remove that subject from the bargaining table altogether.

The FRA's action, moreover, it must be stressed is *not* based on the belief that safety considerations *require* testing in Subpart D circumstances. Had the FRA mandated drug testing beyond Subpart C's requirements, rather than leaving the matter to unilateral employer decision-making, such FRA action would be judged against the longstanding rule that the bargaining contemplated by the RLA takes place against the background of "minimum requirements laid down by state authority . . . regulating working conditions." *Terminal Assn. v. Trainmen*, 311 U.S. 1, 7 (1943).[22] But because Subpart D seeks to preserve for employers the discretionary right to test employees, the regulation "comes into conflict" with the RLA's "policy of protecting collective bargaining." *California v. Taylor*, 353 U.S. 553, 559 (1957).[23]

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[22] *Cf. Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-58 (1985); *Fort Halifax Packing Co. v. Coyne*, —— U.S. ——, 55 L.W. 4699, 4704-05 (June 1, 1987).

[23] In *California v. Taylor*, this Court held that a state cannot apply its civil service law to state employees working on a state-owned railroad regulated by the RLA because "[t]his state civil service relationship is the antithesis of that established by collectively bargained contracts through the rail industry." 353 U.S. at 559. The Court distinguished *Terminal Ass'n* as a case involving "minimum health and safety regulations in the interests of railway employees" which "did not concern a conflict between federally protected collective bargaining and inconsistent state laws." *Id.* at 560 n.8. *Cf.* Cox, *Recent Developments in Federal Labor Laws Preemption*, 41 Ohio St. L.J. 277, 297-98 (1980) (arguing that "the NLRA leaves the states free to regulate employment conditions, provided that the state legislation does not discriminate against collective bargaining" but that a state law whose only policy is that certain subjects "should not be fixed by collective bargaining" is preempted).

Indeed, if Subpart D were deemed to fall within the FRA's statutory authority under the Railroad Safety Act, the FRA would be equally free to remove any other, safety-related subject from the scope of mandatory bargaining on the same rationale proffered here, *viz.*, that bargaining under the RLA is too cumbersome a process and that employer discretion is too important with respect to the particular matter at hand. Thus, the theory underlying Subpart D would ultimately leave the FRA free to act as the czar of a wide range of negotiability disputes under the RLA.

C. It follows that it would take an extraordinary showing to establish that Subpart D falls within the FRA's statutory authority. To defend its regulation the FRA ultimately must be able to show that the Railroad Safey Act authorizes the Agency to trump the RLA by precluding collective bargaining over matters which the RLA plainly commits to its bargaining process. Such "repeals by implication"—which is what the FRA's claim reduces to—"are not favored"; unless "[t]he intention of the legislature to repeal [is] 'clear and manifest' " the proper course is to "read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). And nothing in the language or history of the Railroad Safety Act supports the sweeping assertion of authority on which Subpart D necessarily rests.

1. Prior to the enactment of the Railroad Safety Act in 1970, "scant attention ha[d] been paid to railroad safety at either the State or Federal levels." S. Rep. 91-619, 91st Cong. 1st Sess. at 4 (1969). There were at that time only a handful of federal rail-safety statutes, most quite old, and each "appl[ying] to some very specific safety hazard"; for example, federal authority with respect to freight and passenger cars was limited "to safety

appliances and certain aspects of the brake system." *Id.* In the main, where standards existed prior to 1970, they were "self-imposed by the railroad industry" and were "completely voluntary." *Id.*

The Railroad Safety Act was passed because Congress was persuaded that these "[v]oluntary efforts on the part of railroads have failed to meet the need." *Id.* at 5. The basic point of the Safety Act was thus to authorize the "imposition of *mandatory* [safety] *standards* by the Secretary . . ." *Id.* (emphasis added).

The legislative history of that Act begins in 1968 with the submission to Congress by the Department of Transportation of a rail safety bill. H.R. 16890, 90th Cong. 2d. Sess. That bill faltered in the face of labor and management opposition and was not reported out of committee in either the House or the Senate; indeed at the House hearings Representative Springer, the ranking minority member of the Commerce Committee, commented that the hearing marked "the first time in a long time I can remember that a bill has appeared before this committee with which neither labor nor management is happy." *Hearings on Federal Standards for Railroad Safety*, House Comm. on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 230 (1968) ("1968 House Hearings").

Among the issues that proved most controversial was the question of whether and to what extent to authorize the FRA to regulate railroad *employees*, as distinguished from railroad *equipment*. Section 3(a)(3) of H.R. 16890 would have permitted the FRA to promulgate "rules, regulations or minimum standards governing qualifications of employees and practices, methods and procedures of rail carriers"; that provision was the subject of a great deal of discussion and concern. *See* 1968 House Hearings at 61-65, 129-30, 227-32, 240-41, 256-57, 267,

272-73. Indeed, following the House hearings, Senator Hartke, chairman of the Senate Subcommittee on Surface Transportation, prepared a bill which the Senator introduced at the start of the next session of Congress, which would have denied the Secretary power to "issue rules, regulations, and standards relating to the qualifications of employees." S. 1933, 91st Cong. 1st Sess. § 2 (1968).

At about the same time that Senator Hartke introduced his bill, the new Secretary of Transportation concluded that "a new approach was imperative" and Secretary Volpe then appointed a labor-management Task Force on Railroad Safety. *Hearings on Federal Railroad Safety Act of 1969*, Subcomm. on Surface Transportation, Sen. Comm. on Commerce, 91st Cong. 1st Sess. 337 (1969). Within two months that task force submitted a unanimous report which DOT hailed as a "landmark development" which "sets the stage for a new era of cooperating in building a safe railroad system." *Id.* at 246. That report set in motion the process which led, in relatively short order, to the enactment of the Railroad Safety Act. *See* 115 Cong. Rec. 40204 (1969) (Sen. Prouty).[24]

As part of the compromise which led the railroads to agree to support a federal law the task force unanimously recommended

> 1. That the Secretary of Transportation, through the Federal Railroad Administration, have authority to promulgate reasonable and necessary rules and regulations *establishing safety standards in all areas of railroad safety*, through such notice, hearing, and review procedures as will protect the rights of all interested parties. [*See* H.R. Rep. 91-1194, *supra*, at 75 (emphasis added) (reprinting Task Force report).]

[24] Indicative of the significance of the Task Force report is the fact that it is reprinted in full as an attachment to both the Senate and House Reports on the FRSA. *See* S. Rep. 91-619, *supra*; H.R. Rep. 91-1194, *supra*.

In implementing this recommendation, Congress went to pains to assure that the authority being conferred on the Secretary to regulate employee qualifications would be narrowly cabined. Thus, the Senate Commerce Committee added to the bill drafted by the Transportation Department, S. 3061, 90th Cong. 2d Sess., the penultimate sentence now found in § 202(a) of the FRSA, 45 U.S.C. § 431(a):

> [N]othing in this title shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act, including agreements relating to the qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the secretary under this title.[25]

The Committee explained:

> *The . . . sentence . . . is intended to preclude unwarranted interference by the Secretary of Transportation with any matters which traditionally have been or would have been subject to settlement through collective bargaining agreements.* The pro-

[25] When the Senate bill reached the House, Secretary Volpe opposed the sentence which the Senate Commerce Committee had added on the ground that "there is some uncertainty as to whether agreements relating to qualifications of employees are now within the scope of the Railway Labor Act" and that Congress should not, in the FRSA, impliedly resolve that issue; thus Secretary Volpe urged that the statute simply permit agreements "not inconsistent with Federal safety requirements." *Hearings on Railroad Safety and Hazardous Materials Control*, Subcomm. on Transportation and Aeronautics, House Comm. on Interstate and Foreign Commerce, 91st Cong. 2d Sess. 30 (1970). Congress was unmoved by this objection; indeed the House Committee in its report stated:

> The extent to which [sic] collective bargaining relating to qualifications of employees has not been considered subject to the Railway Labor Act, this section is intended to make it applicable to the Railway Act. [H.R. Rep. 91-1194, *supra*, at 17.]

> tection for agreements arrived at through collective bargaining would not, however, extend to those agreements or elements thereof which were inconsistent with rules, regulations, or standards prescribed by the Secretary in accordance with the authority over railroad safety granted to him by this act. [S. Rep. 91-619, *supra*, at 6-7; emphasis added.]

The House Commerce Committee went still further and added the sentence now found as the final sentence in FRSA § 202(a):

> Nothing in this title shall be construed to give the Secretary authority to issue rules, regulations, orders and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

And on the floor of the House members of the Commerce Committee assured the House that although the Secretary's regulatory authority "will necessarily involve personnel activities . . . [t]*he Railway Labor Act is in no way changed or affected by this law.*" 116 Cong. Rec. 27612 (1970) (Rep. Springer). "*We do not repeal any portion of the Railway Labor Act and the matter of collective bargaining pertaining thereto.*" *Id.* at 27613 (Rep. Pickle).

2. The legislative history of the Railroad Safety Act, then, rather than supporting any possible claim that the Safety Act was intended to authorize the FRA to preclude bargaining over a mandatory subject under the RLA, negates that claim. Three aspects of that history are especially significant here.

First, in enacting the Railroad Safety Act Congress sought to vest the FRA with the authority to promulgate *mandatory* standards to replace "voluntary efforts" by the railroads. A regulation like Subpart D, which simply leaves the railroads free to do what they will with

respect to drug testing, was thus the furthest thing from Congress' mind in 1970.

Second, in creating this regulatory authority, Congress went to pains to place statutory limits on the Secretary of Transportation's power over railroad employees. Congress did so in order "to preclude unwarranted interference by the Secretary of Transportation with any matters which traditionally have been or would have been subject to settlement through collective bargaining." P. 27 *supra*.

Third, and most important of all, the congressional sponsors of the law gave express assurances that the FRSA did not "repeal" and would "in no way change[] or affect[]" the Railway Labor Act. P. 28 *supra*.

The Railroad Safety Act thus leaves no room for a regulation like Subpart D whose purpose and effect is to place in the exclusive discretion of railroad employers a matter that the RLA requires be settled by collective bargaining.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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